

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

) MDL No. 1456

) CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO ALL
CLASS ACTIONS

) Judge Patti B. Saris

**PLAINTIFFS' MOTION FOR LEAVE TO JOIN PIPEFITTERS LOCAL 537 TRUST
FUNDS AS A PLAINTIFF AND PROPOSED CLASS REPRESENTATIVE**

Plaintiffs move the Court for leave to join as an additional Plaintiff and proposed Class 3 representative Pipefitters Local 537 Trust Funds ("Pipefitters Local"). In support of this motion, Plaintiffs state as follows.

Consistent with the Court's Memorandum and Order Re: Motion for Class Certification ("Class Order"), on October 17 Plaintiffs filed a Third Amended Master Consolidated Class Action Complaint ("TAC") that identified additional Class 1, 2 and 3 representatives (seven for Class 1, two for Class 2 and 22 for Class 3).¹ None of the newly proposed representatives for Class 3 resides in Massachusetts nor made any payments for subject drugs in Massachusetts. Consequently, the Track One Defendants are now objecting to the proposed Plaintiffs identified in the TAC because they are not from Massachusetts and did not make any AWP-based payments in the state, even though the Class Order does not mandate either condition as a prerequisite.

¹ The Class Order denied Plaintiffs' motion to certify a nationwide class of Medicare Part B beneficiaries pending Plaintiffs' proposed amendment to add individual class representatives ("Class 1"); certified a statewide class of third-party payors ("TPPs") that pay MediGap supplemental insurance to cover Medicare co-payments, with intent to apply Mass. Gen. Laws ch. 93A ("Class 2"); and certified a statewide class of TPPs and consumers paying for physician-administered drugs in the private context based on AWP, with intent to apply Mass. Gen. Laws ch. 93A ("Class 3"). Class Order at 88.

Mindful of Defendants' position, and in a further effort to protect the Class, Plaintiffs seek to add Massachusetts-based consumers and TPPs to co-lead Classes 2 and 3, in addition to the TPPs originally proposed and those being added via the TAC. Although Plaintiffs reject Defendants' contention that only Massachusetts-based Plaintiffs can be considered class representatives, Plaintiffs propose to add the Pipefitters Local in the event that the Court desires a local presence.

The Pipefitters Local is located at 35 Travis Street, Unit One, Allston, Massachusetts 02134. Between January 1995 and December 2001, it made payments based on AWP for the following drugs marketed by Track One Defendants:²

AstraZeneca: Zoladex
 BMS: Cytosan, Etopophos, Paraplatin, Rubex and Taxol
 GSK: Zofran
 J&J: Procrit

Plaintiffs had been in discussions with Pipefitters Local prior to filing the TAC. In contrast to the process associated with identifying additional individual class representatives, identifying TPPs is much more involved. TPPs have a due diligence process that requires significant lead time to evaluate potential legal action. This process includes formal legal review and presentations to governing boards, whose approval is required to authorize action. Consequently, no Massachusetts representatives for Class 3 could be added to the case on or before the Court's October 17, 2005, deadline, although Plaintiffs had been intensely engaged in ongoing discussions with, and data analysis for, several Massachusetts-based TPPs before that date, including the Pipefitters Local. Pipefitters Local indicated that it needed additional time in order to complete the due diligence process, has completed that process and now wishes to join the case. *See Declaration of Steve W. Berman in Support of Plaintiffs' Motion for Leave to Join*

² Pipefitters is continuing to identify AWP-based payments for other time periods and for subject drugs marketed by the Track Two Defendants.

Pipefitters Local 537 Trust Funds as a Plaintiff and Proposed Class Representative (“Berman Decl.”), at ¶ 2.³

Defendants, notwithstanding their objections to the additional plaintiffs identified in the TAC, have advised that they oppose this motion to add a Massachusetts-based class representative. On November 17, 2005, Plaintiffs sought Defendants’ agreement to add the Pipefitters Local via a proposed stipulation that (i) called for Pipefitters Local to provide documentation that it reimbursed based on AWP within one week of filing an addendum to the complaint; (ii) provided Defendants with 21 days to depose Pipefitters Local on issues of typicality; and (iii) authorized each side to file a 5-page additional brief to supplement the briefing authorized in the Court’s Class Order. The intent behind this proposal was to keep the Track One additional certification proceedings on track, notwithstanding the addition of the Pipefitters Local. Defendants rejected this proposal. Berman Decl. at ¶ 3.⁴

In the event that the Court would like at least one of the Class 3 representatives to have a nexus to Massachusetts for purposes of applying Massachusetts law in a “test case” approach, this proposed amendment accomplishes that result.⁵ Accordingly, Plaintiffs’ respectfully submit that their motion should be granted.

³ In the interests of full disclosure, Plaintiffs advise the Court that they will soon move to add another, additional proposed class representative from Massachusetts: Blue Cross/Blue Shield of Massachusetts (“BCBS MA”). Plaintiffs will promptly move to add BCBS MA to the litigation upon expiration of the 30-day pre-suit notice provision contained in Mass. Gen. Laws ch. 93A, § (9). Defendants, of course, can speed this process by waiving the 30-day pre-suit period.

⁴ Plaintiffs have conferred with Defendants and attempted in good faith to resolve the issues pursuant to Local Rule 7.1(2). Berman Decl. at ¶ 3.

⁵ Given the prospect of adding BCBS MA, as well as additional representatives *vis-à-vis* the Track Two Defendants as contemplated by the Court’s just-issued Case Management Order No. 16, Plaintiffs have not sought to file a fourth amended complaint at this time and instead propose to include the Pipefitters Local by separate order.

DATED: November 29, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, **PLAINTIFFS' MOTION FOR LEAVE TO JOIN PIPEFITTERS LOCAL 537 TRUST FUNDS AS A PLAINTIFF AND PROPOSED CLASS REPRESENTATIVE** to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on November 29, 2005, a copy to LexisNexis File & Serve for Posting and notification to all parties

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